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U.S. Citizenship and Immigration Services

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[redacted]

FILE: [redacted] Office: NEBRASKA SERVICE CENTER Date: SEP 21 2007

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IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

for Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The Director, Nebraska Service Center, denied the employment-based immigrant visa petition, which is now before the Administrative Appeals Office (AAO) on appeal. The decision of the director will be withdrawn and the petition will be remanded for further action and consideration.

The petitioner engages in digital commerce. It seeks to employ the beneficiary permanently in the United States as an "E commerce Solutions Manager" pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2). As required by statute, an ETA Form 9089 Application for Alien Employment Certification approved by the Department of Labor (DOL), accompanied the petition. Upon reviewing the petition, the director determined that the beneficiary did not satisfy the minimum level of education stated on the labor certification. Specifically, the director determined that the beneficiary did not possess a Bachelor of Science degree *in engineering*.

On appeal, counsel notes that in Part H, line 7 of the alien employment certification, the petitioner indicated that an alternate field of study was acceptable. For the reasons discussed below, we withdraw the director's finding that the beneficiary does not meet the requirements of the alien employment certification and remand the matter to the director for an evaluation of the petitioner's ability to pay the proffered wage pursuant to 8 C.F.R. § 204.5(g)(2).

In pertinent part, section 203(b)(2) of the Act provides immigrant classification to members of the professions holding advanced degrees or their equivalent and whose services are sought by an employer in the United States. An advanced degree is a United States academic or professional degree or a foreign equivalent degree above the baccalaureate level. 8 C.F.R. § 204.5(k)(2). The regulation further states: "A United States baccalaureate degree or a foreign equivalent degree followed by at least five years of progressive experience in the specialty shall be considered the equivalent of a master's degree. If a doctoral degree is customarily required by the specialty, the alien must have a United States doctorate or a foreign equivalent degree." *Id.*

As noted above, the ETA Form 9089 in this matter is certified by DOL. Thus, at the outset, it is useful to discuss DOL's role in this process. Section 212(a)(5)(A)(i) of the Act provides:

> In general.-Any alien who seeks to enter the United States for the purpose of performing skilled or unskilled labor is inadmissible, unless the Secretary of Labor has determined and certified to the Secretary of State and the Attorney General that-
>
> > (I) there are not sufficient workers who are able, willing, qualified (or equally qualified in the case of an alien described in clause (ii)) and available at the time of application for a visa and admission to the United States and at the place where the alien is to perform such skilled or unskilled labor, and
> >
> > (II) the employment of such alien will not adversely affect the wages and working conditions of workers in the United States similarly employed.

According to 20 C.F.R. § 656.1(a), the purpose and scope of the regulations regarding labor certification are as follows:

> (a) Under section 212(a)(5)(A) of the Immigration and Nationality Act (INA or Act) (8 U.S.C. 1182(a)(5)(A)), certain aliens may not obtain immigrant visas for entrance into the United States in order to engage in permanent employment unless the Secretary of Labor has first certified to the Secretary of State and to the Secretary of Homeland Security that:
>
> > (1) There are not sufficient United States workers who are able, willing, qualified and available at the time of application for a visa and admission into the United States and at the place where the alien is to perform the work; and
> >
> > (2) The employment of the alien will not adversely affect the wages and working conditions of United States workers similarly employed.

It is significant that none of the above inquiries assigned to DOL, or the remaining regulations implementing these duties under 20 C.F.R. § 656, involve a determination as to whether or not the alien is qualified for a specific immigrant classification or even the job offered. This fact has not gone unnoticed by federal circuit courts.

> There is no doubt that the authority to make preference classification decisions rests with INS. The language of section 204 cannot be read otherwise. *See Castaneda-Gonzalez v. INS*, 564 F.2d 417, 429 (D.C. Cir. 1977). In turn, DOL has the authority to make the two determinations listed in section 212(a)(14) [current section 212(a)(5)].[1] Id. at 423. The necessary result of these two grants of authority is that section 212(a)[(5)] determinations are not subject to review by INS absent fraud or willful misrepresentation, but all matters relating to preference classification eligibility not expressly delegated to DOL remain within INS' authority.
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> * * *
>
> Given the language of the Act, the totality of the legislative history, and the agencies' own interpretations of their duties under the Act, we must conclude that Congress did not intend DOL to have primary authority to make any determinations other than the two stated in section 212(a)[(5)]. If DOL is to analyze alien qualifications, it is for the purpose of "matching" them with those of corresponding United States workers so

[1] As amended by Sec. 601, and as further amended by Sec. 172 of the Immigration Act of 1990, Act of Nov. 29, 1990, Pub. L. 101-649, 104 Stat. 4978; however, the changes made by Sec. 162(e)(1) were repealed by Sec. 302(e)(6) of the Miscellaneous and Technical Immigration and Naturalization Amendments of 1991, Pub. L. No. 102-323, 105 Stat. 1733, effective as though that paragraph had not been enacted.

> that it will then be "in a position to meet the requirement of the law," namely the section 212(a)[5] determinations.

Madany v. Smith, 696 F.2d 1008, 1012-13 (D.C. Cir. 1983). The court in *K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006, 1008 (9th Cir. 1983), reached a similar conclusion, relying on an amicus brief from DOL that stated the following:

> The labor certification made by the Secretary of Labor ... pursuant to section 212(a)[(5)] of the ... [Act] ... is binding as to the findings of whether there are able, willing, qualified, and available United States workers for the job offered to the alien, and whether employment of the alien under the terms set by the employer would adversely affect the wages and working conditions of similarly employed United States workers. *The labor certification in no way indicates that the alien offered the certified job opportunity is qualified (or not qualified) to perform the duties of that job.*

(Emphasis added.) *Id.* at 1009. The Ninth Circuit revisited this issue, stating that the Immigration and Naturalization Services (INS), now Citizenship and Immigration Services (CIS), "may make a de novo determination of whether the alien is in fact qualified to fill the certified job offer." *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman,* 736 F. 2d 1305, 1309 (9th Cir. 1984). *But cf. Hoosier Care, Inc. v. Chertoff,* 482 F.3d 987 (7th Cir. 2007) (relating to a lesser classification than the one involved in this matter and relying on the regulation at 8 C.F.R. § 204.5(l)(4), a provision that does not relate to the classification sought here).

Where the job requirements in a labor certification are not otherwise unambiguously prescribed, e.g., by professional regulation, CIS may not ignore a term of the labor certification, nor may it impose additional requirements. *See Madany*, 696 F.2d at 1015. CIS must examine "the language of the labor certification job requirements" in order to determine what the job requires. *Id.* The only rational manner by which CIS can be expected to interpret the meaning of terms used to describe the requirements of a job in a labor certification is to examine the certified job offer *exactly* as it is completed by the prospective employer. *See Rosedale Linden Park Company v. Smith*, 595 F. Supp. 829, 833 (D.D.C. 1984). CIS's interpretation of the job's requirements, as stated on the labor certification must involve reading and applying *the plain language* of the alien employment certification application form. *See id.* at 834. CIS cannot and should not reasonably be expected to look beyond the plain language of the labor certification that DOL has formally issued or otherwise attempt to divine the employer's intentions through some sort of reverse engineering of the labor certification.

The key to determining the job qualifications is found on ETA Form 9089 Part H. This section of the application for alien labor certification, "Job Opportunity Information," describes the terms and conditions of the job offered. It is important that the ETA Form 9089 be read as a whole.

In this matter, Part H, line 4, of the labor certification reflects that a bachelor's degree is the minimum level of education required. Line 4-B indicates that the major field of study required is

engineering. Line 6 reflects that five years of experience is also required. Significantly, the petitioner indicated on Line 7 that "an alternative field of study" is acceptable. On line 7-A, which requests that the petitioner specify the alternate major field of study, the petitioner used the mandated language from 20 C.F.R. § 656.17(h)(4)(ii), stating that any suitable combination of education, training or experience is acceptable. Line 9 reflects that a foreign educational equivalent is acceptable. We note that the petitioner reiterated on lines 8-A through 8-C and line 10-A that a baccalaureate degree plus five years of experience is the minimum education and experience required, stating in line 10-B that acceptable experience would include experience as a project manager, quality assurance manager or test engineering manager.

A reading of Part H as a whole reveals that a bachelor's degree in a field other than engineering combined with five years of experience in specified occupations is acceptable. Thus, we withdraw the director's finding that the job requires a Bachelor of Science in Engineering.

The beneficiary received a Bachelor of Social Science in Economics and Industrial Psychology from Rhodes University in 1996. The petitioner submitted an evaluation from Morningside concluding that in attaining this degree, the beneficiary "satisfied requirements equivalent to those required for the attainment of a Bachelor of Arts degree in Economics from an accredited institution of higher education in the United States." The petitioner also submitted letters from employers documenting more than five years of experience as a software testing group manager, group manager and "Project Lead" supervising three to five software test engineers. Considering this experience in addition to the beneficiary's education, Morningside concluded that the beneficiary had the equivalent of a Master of Science in Computer Information Systems. We find that the beneficiary's baccalaureate plus five years of relevant experience are sufficient to meet the job requirements as set forth on Part H of the alien employment certification.

Although the petitioner has overcome the director's basis of denial, the director failed to address the issue of the petitioner's ability to pay the proffered wage, which must be demonstrated before the petition can be approved. 8 C.F.R. § 204.5(g)(2). Therefore, this matter will be remanded for consideration of the petitioner's ability to pay the proffered wage pursuant to 8 C.F.R. § 204.5(g)(2). Specifically, as the petitioner shows a large net loss and negative net current assets in 2004, the director shall request evidence relating to the priority date in this matter, January 30, 2006, including both the evidence specified at 8 C.F.R. § 204.5(g)(2) and evidence of wages actually paid to the beneficiary. As always in these proceedings, the burden of proof rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361.

ORDER: The director's decision is withdrawn. The petition is remanded to the director for further action in accordance with the foregoing and entry of a new decision which, if adverse to the petitioner, is to be certified to the Administrative Appeals Office for review.